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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

REC'D  
FEB 27 1997  
FCC

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 94-78
Table of Allotments,	)	RM-8472
FM Broadcast Stations.	)	RM-8525
(Cloverdale, Montgomery	)	
and Warrior Alabama)	)	
	)	

TO: The Full Commission

**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission's Rules and Regulations (47 C.F.R. §1.115), William P. Rogers ("Rogers"), by his attorney, hereby respectfully requests the full Commission to review and set aside the action of the Chief, Policy and Rules Division, taken by Memorandum Opinion and Order, released February 21, 1997, denying Rogers' Petition for Reconsideration of the Report and Order<sup>1</sup>, which denied Rogers' counterproposal to allocate FM Channel 254A to the City of Florence, Alabama. In support thereof, it is alleged:

**I. Procedural Requirements:**

1. Section 1.115 of the Commission's Rules provides for

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<sup>1</sup>10 FCC Rcd 13630 (Allocations Branch 1995).

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the filing of applications for review of actions taken by delegated authority. This is an application for review of an action taken by delegated authority, which denied Rogers' request to allocate an FM channel to Florence, Alabama. Section 1.115(b)(1) requires that the questions presented for review be concisely and plainly stated.

Here, there is only one question:

"Where the FCC staff denied a request to allocate an FM channel to Florence, Alabama, because (a) the allotment would, allegedly, be short-spaced to the transmitter site of an existing station, and (b) the allotment would not cover 100% of the boundaries of the City of Florence, and where it was shown that the staff erred when it assumed a short-spacing to the existing station and admitted that it had erred, and where the staff was shown by case precedent that the FCC has frequently made FM allotments where there is no transmitter site from which a city grade signal can be provided to the entire community, and where the staff did not refute the case precedents cited by the proponent of the allotment or disagree with same, did the staff err when it refused to reconsider its denial of the allotment?"

2. Section 1.115(b)(2) requires a statement of the reasons which warrant Commission consideration of the questions presented. Briefly, the staff's action is in direct contravention of applicable precedent and, if allowed to stand, could deprive the FCC of the flexibility that it needs to properly administer the allocations scheme mandated by Section 307(b) of the Communications Act. Section 1.115(b)(3) provides that an application for review state with particularity the respects in which the staff action should be changed. Briefly, the staff action should be reversed and the Table of FM Allotments modified to assign Channel 254A to Florence. That is also the form of relief sought (Section

1.115(b)(4)).

## II. Argument:

3. The staff's actions in this proceeding create at least two novel legal precedents, both of them bad. In the past, the FCC has often created new FM allotments, even if the allotments would be short-spaced, if there was in existence a construction permit for a change in the facilities of another station, which would eliminate the short spacing. For example, in Linden, Texas, 10 FCC Rcd 5126 (1995), the staff allotted a channel to Linden, Texas, even though the allotment would be short-spaced until a station in Atlanta, Texas, applied for and received a construction permit to specify a different channel. The staff simply ruled that the licensing of the new channel at Linden be deferred until the station at Atlanta was licensed on its new channel. See also, e.g., North Mankato, Minnesota, 5 FCC Rcd 7477 (1990).

4. Here, the staff denied a proposal to allocate an FM channel to Florence, Alabama, because the proposal would be short-spaced to the licensed transmitter site of Station WZLQ(FM), Tupelo, Mississippi, even though the WZLQ licensee had a valid construction permit to move its operations to a site that is not short-spaced. The staff initially acted as it did, because the expiration date specified in the permit had run out, and no license application had been filed. That action, on the part of the staff, was erroneous on its face, because under well-established principles of law, a construction permit remains in effect until deleted by the FCC. Baker v. FCC, 834 F.2d 181 (D.C. Cir. 1987).

Furthermore, the action was also factually incorrect, because at the time of the initial staff action the facilities authorized by the construction permit had actually been completed, the licensee having simply failed to timely file an extension or license application.

5. The staff now admits that it acted under a mistaken impression of the facts, but indicates that its actions were still correct, because it had no way of knowing whether the WZLQ licensee would, in fact, complete the change in transmitter site.

6. Rogers respectfully submits that this rationalization is a dangerous one! It threatens to deprive the FCC of the flexibility, often used in the past, to make new allotments conditioned upon the reasonable anticipation that the holder of a construction permit will complete construction under the permit. It represents a drastic and unwise departure from established policy. It threatens to deprive the FCC of the opportunity to make valuable new allotments which, in the future, if auctions are held, may be an important source of revenue to the Treasury.

7. A second reason given by the staff for denying the allotment is that the allotment, allegedly, would not serve 100% of the City of Florence with a city grade (3.16 mv/m) signal. That reason also represents a drastic and unwarranted departure from well-established policy. Common sense says that a Class A allotment will often fall short of 100% city coverage if the city is fairly large and sprawling. This has never deterred the FCC from making allotments in the past, where they were otherwise

justified. In Bay Shore, New York, 57 Pike and Fischer RR 2d 1275 (1985), the Commission made an allotment where no portion of the city grade contour would even touch the community of license. Frequently, allotments have been made where only a small portion of the community would receive city grade service. See the discussion in Woodstock and Broadway, Virginia, 2 FCC Rcd 7064 (Allocations Branch 1988) at footnote 2.

8. The processing line accepts applications for filing where it can be shown that 80% or more of the city will receive a 3.16 mv/m or better signal. Rogers made a showing that a site existed from which the 80% requirement could be achieved. That should have been sufficient to mandate the proposed allotment.

9. Where there is no transmitter site from which complete coverage of the city can be achieved, it has been past practice to designate applications for construction permits for hearing on issues pertaining to a waiver of the city coverage rule. Virginia Beach, Virginia, 5 FCC Rcd 3949 (HDO 1990). Here, however, because suitable sites, providing coverage of better than 80% of the city, are available, no waiver of the rule is even required. Barry Skidelsky, 70 RR 2d 722 (Rev. Bd. 1992).

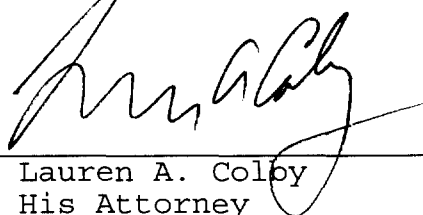
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 20<sup>th</sup> day of March, 1997, to the offices of the following:

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